Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-1438

HAROLD LAMONT OTEY,

Petitioner,

vs.

THE STATE OF NEBRASKA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I.

OPINIONS BELOW

The opinion of the Supreme Court of Nebraska has been attached to and made a part of the petitioner's petition for a writ of certiorari to the Supreme Court of the State of Nebraska.

—o—

II.

JURISDICTION

The jurisdictional requisites are set forth in the petitioner's jurisdictional statement and the respondent accepts that jurisdictional statement.

———o———

III.

QUESTIONS PRESENTED

The petitioner has listed five questions presented for review and the respondent accepts the petitioner's statement of the questions presented for review.

———o———

IV.

STATEMENT OF THE CASE

Respondent accepts the petitioner's statement of the case.

———o———

ARGUMENT

I.

The Nebraska Death Penalty Statutes do not violate the Eighth and Fourteenth Amendments to the Constitution of the United States.

A.

The aggravating and mitigating circumstances established by the Nebraska statutes are not impermissibly vague or broad.

The petitioner argues that the aggravating and mitigating circumstances established by the Nebraska statutes are impermissibly broad and vague. He contends that reasonable men would have to guess at the meaning of numerous terms contained in the statutes and that the Nebraska Legislature did not provide adequate guidance, through expressions of legislative intent or definitions, to guide the sentencing authority in its interpretation of the various circumstances.

Similar arguments have been previously reviewed and rejected by this court in *Gregg v. Georgia*, 428 U. S. 242, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), *Proffitt v. Florida*, 428 U. S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), and *Jurek v. Texas*, 428 U. S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976).

A review of the aggravating and mitigating circumstances established by the Nebraska statutes shows that these circumstances are very similar to the aggravating and mitigating circumstances established by the Florida law and to the aggravating circumstances established by the Georgia law. Further, they are much more explicit than the aggravating and mitigating circumstances which this court found existed under the Texas statutes.

Further, in all of the three previously cited cases, this court indicated that the questioned provisions must be reviewed as they have been construed by the Supreme Court

of the subject state. The Supreme Court of Nebraska, in *State v. Stewart,* 197 Neb. 497, 250 N. W. 2d 849 (1977), *State v. Rust,* 197 Neb. 528, 250 N. W. 2d 867 (1977), *State v. Holtan,* 197 Neb. 544, 250 N. W. 2d 876 (1977), *State v. Simants,* 197 Neb. 549, 250 N. W. 2d 881 (1977), and *State v. Peery,* 199 Neb. 656, 261 N. W. 2d 95 (1977), further defined and narrowed many of the aggravating and mitigating circumstances challenged by the petitioner.

It is clear from this court's previous decisions that the aggravating and mitigating circumstances are necessary to provide guidelines for the deliberations of the sentencing authority. In Nebraska, the sentencing authority consists of the trial judge or of a three judge panel. Therefore, the sentencing authority is comprised of individuals who are experienced in interpreting statutory language and applying interpretations provided by the Supreme Court of Nebraska.

Finally, this court in *Gregg v. Georgia, supra,* stated:

> "While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary. Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner." (428 U. S. at 195)

The aggravating and mitigating circumstances established by the Nebraska Death Penalty Statutes, especially when viewed in conjunction with the narrowing and limiting language contained in the decisions of the Supreme

Court of Nebraska, provide sufficient guidance to the sentencing authority to reduce the likelihood that the death penalty will be arbitrarily imposed. Therefore, these circumstances set forth in Neb. Rev. Stat. § 29-2523 (Reissue 1975) are not unconstitutionally broad and vague.

B.

The Nebraska capital sentencing procedure does not limit the mitigating factors which may be considered by the sentencing body.

The petitioner contends that the Nebraska statutes are unconstitutional because they limit the consideration of independent mitigating factors pertaining to the defendant's character, record and the circumstances of the offense. He relies on this court's decisions in *Lockett v. Ohio,* 438 U. S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) and *Bell v. Ohio,* 438 U. S. 637, 98 S. Ct. 2977, 57 L. Ed. 2d 1010 (1978).

This court found that the imposition of the death penalty in *Lockett v. Ohio, supra,* was:

> ". . . invalid because the statute under which it was imposed did not permit the sentencing judge to consider, as mitigating factors, her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime." (438 U. S. at 597).

Under the mitigating circumstances established by Neb. Rev. Stat. § 29-2523 (2) (Reissue 1975), the sentencing authority in Nebraska would be required to consider a defendant's character, prior record, age, lack of specific intent to cause death and his or hers relatively minor part in the crime.

In *Lockett v. Ohio, supra,* this court also stated:

> "The Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors we now hold to be required by the Eighth and Fourteenth Amendments in capital cases. Its constitutional infirmities can best be understood by comparing it with the statutes upheld in *Gregg, Proffitt,* and *Jurek.*" (438 U. S. at 606).

The Nebraska statutes are almost identical to the Florida statutes which were upheld in *Proffitt v. Florida, supra.* Under both systems, if a defendant is found guilty of a capital offense, a separate evidentiary hearing is held to determine his sentence. At that hearing, evidence may be presented on any matter that the judge deems relevant to sentencing and must include matters relating to the legislatively specified aggravating and mitigating circumstances. The prosecution and the defense attorneys are allowed to present arguments on whether the death penalty should be imposed. The sentencing authority is required to set forth its findings in writing and if the death sentence is imposed, the decision is automatically reviewed by the State Supreme Court.

Clearly, the Nebraska statutes, which are so similar to the Florida statutes which this court found to be constitutional, do not unconstitutionally limit the consideration of mitigating factors by the sentencing authority when it is determining whether or not to impose the death penalty in a particular case.

C.

The Nebraska Death Penalty Statutes are not unconstitutional because the trial judge has several options as to the composition of the sentencing authority.

The petitioner contends that the Nebraska Death Penalty Statutes are unconstitutional because the trial judge has several options as to the composition of the sentencing authority. He argues that decision made by the trial judge in this portion of the proceedings is standardless and will result in the inconsistent application of the death penalty in Nebraska.

This contention is similar to an argument advanced in *Gregg v. Georgia, supra,* concerning discretion exercised by a prosecutor. This court found that the exercise of discretion at various stages of the legal proceedings did not invalidate the imposition of the death penalty. In the opinions in *Gregg v. Georgia, supra,* it is stated:

> "Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.
>
> ". . . Petitioner's argument that there is an unconstitutional amount of discretion in the system which separates those suspects who receive the death penalty from those who receive life imprisonment,

> a lessor penalty, or are acquitted or never charged, seems to be in final analysis an indictment of our entire system of justice. Petitioner has argued, in effect, that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, it is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law." (428 U. S. at 225-226).

Finally, the petitioner contends that the Nebraska statutes are unconstitutional because they do not provide for review of the decision of the trial judge on whether to make the sentencing determination himself, with two other appointed judges, or to remove himself. Under the Nebraska Death Penalty Statutes, the Supreme Court of Nebraska automatically reviews any case in which a defendant is sentenced to death. The question of whether the trial judge improperly determined to sentence a defendant himself or to use a three judge panel is reviewable in this automatic appeal.

II.

The Nebraska Death Penalty Statutes provide for a meaningful appellate comparison of the imposition of the death penalty.

A.

The Nebraska Statutes, as interpreted by the Nebraska Supreme Court, provide adequate comparison to insure that the death penalty is being uniformly imposed throughout the state.

The petitioner argues that the Nebraska Death Penalty Statutes are unconstitutional because the Supreme

Court of Nebraska has failed to fully comply with the provisions of Neb. Rev. Stat. § 29-2521.02 (1978 Supp.) which provides:

> "The Supreme Court shall within a reasonable time after July 22, 1978, review and analyze all cases involving criminal homicide committed on or after April 20, 1973. Such review and analysis shall examine (1) the facts including mitigating and aggravating circumstances, (2) the charges filed, (3) the crime for which defendant was convicted, and (4) the sentence imposed. Such review shall be updated as new criminal homicide cases occur."

He contends that the limitations put on the comparative review by the Supreme Court of Nebraska in its opinion in *State v. Williams,* 205 Neb. 56, 287 N. W. 2d 18 (1980) do not comply with the procedural standards established in *Gregg v. Georgia, supra.*

When originally passed in 1973, the Nebraska Death Penalty Statutes, similar to the Florida statutes, did not contain a specific provision requiring that the Supreme Court of Nebraska conduct a comparative review in cases involving the death penalty. However, the Supreme Court of Nebraska in *State v. Simants, supra,* one of the first cases decided under the new Nebraska Death Penalty Statutes, recognized the need for comparative review and stated:

> "While we do not have the Georgia provision for proportional review, every capital case where there can be the slightest question will be considered in comparison with other capital cases. In other words, we will compare each capital case under review with those previous cases in which the death penalty has or has not been imposed under the new statute." (197 Neb. at 563-564, 250 N. W. 2d at 890).

In *State v. Williams, supra,* the Supreme Court of Nebraska reviewed the requirements of Neb. Rev. Stat. § 29-2521.02 and § 29-2521.03 (1978 Supp.) for the first time. The court determined that the law was to be:

> ". . . construed to require the Supreme Court to review and analyze only cases involving a conviction for first degree murder committed on or after April 20, 1973." (205 Neb. at 76, 287 N. W. 2d at 29).

The petitioner contends that this interpretation is too limited and does not comply with the requirements established in *Gregg v. Georgia, supra,* for comparative review. This is basically an attack upon discretionary decisions made by a prosecutor or a jury which result in the elimination of some criminal homicides from the Supreme Court of Nebraska's comparative review. The claim that this makes a state's death penalty statutes unconstitutional has been previously rejected in *Gregg v. Georgia, supra,* and in *Proffitt v. Florida, supra.* In fact, in footnote 56 to the opinion in *Gregg v. Georgia, supra,* it is stated:

> "The petitioner claims that this procedure has resulted in an inadequate basis for measuring the proportionality of sentences. First, he notes that nonappealed capital convictions where a life sentence is imposed and cases involving homicides where a capital conviction is not obtained are not included in the group of cases which the Supreme Court of Georgia uses for comparative purposes. The Georgia court has the authority to consider such cases, see *Ross v. State,* 233 Ga. 361, 365-366, 211 S. E. 2d 356, 359 (1974), and it does consider appealed murder cases where a life sentence has been imposed. We do not think that the petitioner's argument establishes that the Georgia court's review process is ineffective." (428 U. S. at 204).

The Georgia system which limits comparative review to capital convictions which have been appealed to the Georgia Supreme Court, whether they resulted in the imposition of the death sentence or not has been found to be constitutional by this court. The Supreme Court of Nebraska conducts an even more extensive comparative review than the Supreme Court of Georgia, because it has indicated that for comparison purposes it will utilize first degree murder convictions, whether they have been appealed to the court or not, and whether or not they resulted in the imposition of the death sentence. This clearly complies with the constitutional requirements by this court.

B.

The Nebraska procedures for comparative appellate review do not deny the petitioner effective assistance of counsel.

The petitioner contends that the Nebraska procedures are constitutionally defective because they deny the petitioner his right to effective assistance of counsel since the counsel is unable to argue the facts of other criminal homicides because the information is not available.

As previously indicated, this court has previously found that the Georgia procedures for comparative review, which limit the review to cases involving the same capital crime and which have been appealed to the Supreme Court of Georgia, to be constitutional. Further, the Supreme Court of Nebraska has indicated that in

determining the propriety of the imposition of the death sentence in a case, it will compare the case with first degree murder cases, whether they have been appealed to that court or not and whether or not they have resulted in the imposition of the death sentence. In *State v. Williams, supra,* the Supreme Court of Nebraska included a list of thirty-two cases in addition to the *Williams* case which it would use for comparative review purposes. Information on all of these cases, which includes the bill of exceptions and the transcript, have been collected by the Supreme Court of Nebraska and is available through the clerk's office. Therefore, this information is available to any attorney, whether representing the defendant or the State, for use in preparing argument to the sentencing authority or to the Supreme Court of Nebraska.

III.

The denial of the petitioner's motion for a continuance did not deny the petitioner his Sixth Amendment right to a fair trial and to effective assistance of counsel.

The petitioner argues that the trial court improperly denied his motion for a continuance and that by overruling the motion, the court denied him of meaningful representation and a fair trial. He bases this contention on the failure of the State of Nebraska to file its endorsement of witnesses until April 5, 1978, and claims that the late endorsement of the names of the witnesses prevented his counsel from properly preparing a defense, including interviewing the State's witnesses.

This court has previously determined that a decision on a motion for a continuance is within the discretion of the trial judge. As stated in *Avery v. Alabama,* 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940):

> "Since the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel. In the course of trial, after due appointment of competent counsel, many procedural questions necessarily arise which must be decided by the trial judge in the light of facts then presented and condition then existing. Disposition of a request for a continuance is of this nature and is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed."

The purpose of endorsing the names of the witnesses on the information is to inform the defendant of the names of the witnesses who will testify against him and to enable the defendant and his counsel to investigate facts about the witnesses and their connection with the case. In this case, a motion for discovery was filed by the defense counsel on February 8, 1978, which requested the names and addresses of all witnesses. This motion was granted. A copy of the notice to apply to the court for permission to endorse witnesses on the information, which contained a list of the witnesses to be endorsed, was delivered to the defense counsel on March 3, 1978. Finally, the record in this case shows that the names of most of the witnesses appeared in the police reports that had been furnished to the defendant.

Therefore, the names of the State's witnesses were known to the petitioner's counsel quite some time before

the trial and the late endorsement of the witnesses names did not deny the petitioner any constitutionally protected rights.

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CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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